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80-1654

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA

v.

JOHN RICHARD HUMPHRIES, PETITIONER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DAVID S. HOFFMAN
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Attorney for Petitioner
John Richard Humphries

QUESTIONS PRESENTED

1. Does the Ninth Circuit Court of Appeals' Opinion erroneously utilize the standard set forth in *United States v. Crews,* 445 U.S. 463, 100 S. Ct. 1244 (1980), for live witness, in-court identification testimony as the standard to be utilized in determining admissibility of non-testimonial, physical evidence such as the surveillance photographs in the instant matter?

2. Does the Ninth Circuit Court of Appeals' Opinion erroneously use the rationale of *United States v. Crews,* supra, to eridicate the standards set forth in *United States v. Ceccolini,* 435 U.S. 263, 98 S.Ct. 1054 (1968), concerning the admissibility of non-victim, live witness, in-court identification testimony?

3. Has the Ninth Circuit Court of Appeals improperly altered factual findings and relied upon speculation rather than facts demonstrated in the record in arriving at its conclusions?

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OPINION BELOW

The October 30, 1980 Opinion of the United States Court of Appeals for the Ninth Circuit is attached hereto as Appendix A; the February 6, 1981 Order of the Ninth Circuit Court of Appeals denying Petitioner's Motion for Rehearing is attached hereto as Appendix B. The initial opinion of the Ninth Circuit in this matter (the January 19, 1979 Opinion) is attached hereto as Exhibit C.

JURISDICTION

The Judgment of the Court of Appeals was entered on October 30, 1980. A timely Petition for Rehearing was denied by Order dated February 19, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. S1254 (1).

STATEMENT

A. JURISDICTION

Petitioner and four others were charged in a four-court indictment with conspiracy to import marijuana in violation of 21 U.S.C. 963, 21 U.S.C. 960 (a) (1) and 925 (a), conspiracy to distribute marijuana in violation of 21 U.S.C. 960 (a) (1) and (b) and 952 (a), and attempted possession of marijuana with intent to distribute it in violation of 21 U.S.C. 846 and 841 (a) (1) and (b) and 18 U.S.C. 2.

Following two pretrial hearings, the district court ordered that "all evidence concerning the identity and participation of [petitioner] in this case is suppressed for the reason that the [government] has not shown that any of such evidence is derived from a source other than the illegal arrest of [petitioner]" (App. A *infra,*).[1]

The Government appealed to the Ninth Circuit Court of Appeals and the Court of Appeals, although reversing in part, affirmed the majority of the trial court's ruling. (See Appendix C, the initial Opinion rendered by the Ninth Circuit Court of Appeals on January 19, 1979.)[2]

Thereafter, the Government filed a Petition for Writ of Certiorari to this Court by Petition dated June 1, 1979. Following the submission of a Petition for a Writ of Certiorari and Humphries' Petition in Opposition thereto, this Court on April 14, 1980 entered an Order granting the Peitition for Writ of Certiorari, vacating the Judgment in this matter and remanding the matter to the United States Court of Appeals for the Ninth Circuit for further consideration in view of *United States v. Crews,* 445 U.S. 463 (1980) (Appendix D.)

Following the submission of briefs to the Ninth Circuit Court of Appeals by the respective parties, on

October 30, 1980, the Ninth Circuit ruled. The Ninth Circuit reversed its prior ruling and held that various items of evidence initially suppressed are admissible. Petitioner filed a timely Petition for Rehearing with the Ninth Circuit which was denied on February 6, 1981. (Appendix B.)

It is from the latest ruling of the Ninth Circuit Court of Appeals (Appendix A) that Petitioner seeks relief.

[1]Two suppression hearings were held before different judges of the district court. After the first hearing, Judge Muecke found that petitioner had been detained without probable cause and granted petitioner's motion to suppress "the identity of John Richard Humphries as a defendant in this matter and any and all other physical evidence and statements obtained as a result of the illegal arrest of [petitioner] in this matter." (App. A *infra,* 1a). Eight days later, in view of uncertainties concerning the scope of Judge Muecke's order, the government filed a "Motion for Determination of Admissibility of Evidence", seeking to determine precisely what was to be suppressed (App. A, *infra*). A hearing on this motion was held before Judge Davies, and further evidence was presented. Judge Davies denied the motion and ordered the suppression of "all evidence concerning the identity and participation of [petitioner] in this case***." The government then appealed Judge Davies' order under 18 U.S.C. 3731.

[2]The Court of Appeals rejected the defense claim that there was no jurisdiction to entertain the appeal under the Criminal Appeals Act, 18 U.S.C. 3731, because the government had failed to appeal the initial order of Judge Muecke within 30 days. The court ruled: "Given the confusion surrounding the earlier order, and that the Government indeed presented different evidence in the hearing on its motion, we cannot agree with Humphries that the Government's actions were calculated to circumvent the requirements of the Criminal Appeals Act. The Government's appeal is one from Judge Davies' order suppressing all evidence relating to Humphries. Such an appeal is proper under§ 3731 and was timely filed" (App. A, *infra,* 9a-10a; footnotes omitted).

B. STATEMENT OF THE FACTS

Evidence adduced at hearings on petitioner's motion to suppress demonstrated that on the afternoon of October 21, 1976, Everett Whiteman, a special officer with the Bureau of Indian Affairs (BIA), discovered an airplane that had crashed on a remote site within the San Carlos Indian Reservation in Arizona (I Tr. 46, 84; II Tr. 8).[3] Inside the airplane Whiteman found 1,500 pounds of marijuana and a motel receipt bearing the name James Thompson with an Aspen, Colorado, post office box address. No one was found in the airplane or in the adjacent area (I Tr. 48, 51, 85-86; II Tr. 9, 16, 37).

At 6:30 A.M. the following day, Whiteman questioned James Jameson (subsequently a co-defendant), who was parked in a 1971 Monte Carlo automobile two miles from the crashed airplane. Jameson told Whiteman that he lived in Tucson and had stopped there after driving around following an argument with his wife (I Tr. 52-58; II Tr. 16-18). Jameson was not arrested at that time (I Tr. 97).

At 10:30 P.M. on October 23,[4] Whiteman received a radio dispatch informing him that Frank Sisto, a San

[3]"I Tr." refers to the reporter's transcript of the hearing on respondent's motion to suppress held on October 6, 1977, and "II Tr." refers to the reporter's transcript of the hearing on the government's motion for a determination of admissibility of evidence held on February 15, 1978. See note 1, *supra*.

[4]Earlier that same day, a Fish and Game ranger picked up co-defendants Lon Raymond Jordan and Jerry Robert Torres, who were hitchhiking near the plane crash site, and brought them to the police station in San Carlos for questioning (I Tr. 53-54). Jordan and Torres told officer Whiteman that the previous night they had become intoxicated, picked up two Indian girls, driven out to the country, and stayed out all night (I Tr. 53-54). They were not then arrested (I Tr. 97).

Carlos resident, had picked up two non-Indian strangers (petitioner and co-defendant Ricardo Rubio) in an area near the crash site and driven them to a store one block from the San Carlos police station (I Tr. 56-58, 95).[5] Whiteman told another officer to take the two men to the police station so that he could question them about the airplane (I Tr. 57-58, 73-74, 105).

Shortly thereafter, Whiteman arrived at the police station and immediately advised petitioner of his *Miranda* rights (I Tr. 59-62, 93, 103-104). Petitioner said he understood his rights and signed a written waiver form (I Tr. 62-63). Petitioner told Whiteman that he and his friend were hiking in San Carlos. Whiteman expressed disbelief because it was unusual for people to be hiking in the area during such rainy weather. (I Tr. 63-64). When Whiteman informed petitioner that he was investigating the crash of an airplane with a load of marijuana, petitioner asked if he was under arrest. Whiteman said he was not, and petitioner refused to answer any more questions until he had spoken with his attorney (I Tr. 64). Whiteman did not ask any further questions or charge him with any offense, but he took petitioner's photograph and

[5]Sisto testified that on the evening of October 23, Petitioner and Rubio knocked on the door of his daughter's house, which is near the crash site, said that their truck had broken down, and asked to use the phone to summon assistance. Sisto offered to drive them to the police station, but they stated that they did not want to wait there, so Sisto drove them to the tribal store in San Carlos, where they could wait for someone to pick them up. Because the tribal store was closed and because he was worried and had a "funny feeling" about the two men (I Tr. 24), Sisto left them at the store but then called the police to help them (I Tr. 20-24).

fingerprints and obtained his date of birth, social security number, and address (which proved to be fictitious); Whiteman than allowed petitioner to leave (I Tr. 59, 64-68, 103; II Tr. 19, 27, 47-48).[6]

Earlier that same day (October 23), a truck driver had given Whiteman the description of a hitchhiker (later identified as James Thompson), whom he drove from the area of the crashed plane to a nearby airport (II Tr. 12-14). On October 27, Whiteman spoke with Robert Mace, the manager of the airport, who told Whiteman that the Hitchhiker had telephoned a cab company (II Tr. 13-14). The cab company informed Whiteman that it took the hitchhiker from the airport to the Cooper Manor Hotel. The hotel manager informed Whiteman that James Thompson of Colorado (the name on the motel receipt found in the airplane) had registered at the hotel on October 21, 1976 (II Tr. 15-16).

Whiteman then gave all the information he had uncovered to the Drug Enforcement Administration and to the Arizona Department of Public Safety, Narcotics Enforcement Section; he did not participate further in the investigation (I Tr. 99; II Tr. 16, 18-19, 24-25, 37-38).

Officer Douglas Stine of the Arizona Public Safety Department received the information developed by Whiteman and was assigned to continue the investigation (2 Tr. 37-38). In the following weeks, Stine learned that the crashed aircraft was registered to a company in Chicago and that it had been sold to a person known only as "Bullet" Thompson, who lived in Colorado. Stine also learned that Thompson had stayed at the Lincoln-Shire Marriott Hotel near Chicago during September 1976 and had made several

long distance telephone calls. Stine traced one of the telephone numbers called by Thompson to 10320 North 37th Street, Scottsdale, Arizona (II Tr. 39-41). The subscriber of the phone was Sara Braun, and the bill was guaranteed by John Alexander, who Stine knew had previously been arrested with Lon Jordon (who had been seen near the crashed plane) for drug smuggling (II Tr. 38, 41-42).

On November 17, 1976, Stine went to the Scottsdale residence and saw in the driveway the 1971 Monte Carlo that had been seen near the plane crash (II Tr. 42-43). Stine also observed petitioner standing near the driveway. He identified petitioner from a driver's license photograph he had obtained from the Arizona Motor Vehicle Division following receipt of petitioner's name from the BIA (I Tr. 107-108; II Tr. 44-45, 59). On the basis of all of these observations, Stine ordered a 24-hour surveillance of the residence from November 29 to December 4, 1976. During the surveillance, agents took photographs of the 20 to 30 people (including petitioner) seen in and around the residence (II Tr. 45-46, 61, 63-64).

Meanwhile, in the first week of November, 1976, Stine received a photograph of Dennis James Thompson from the Colorado Bureau of Investigation (II Tr. 46). The truck driver and the airport manager identified Thompson from the photograph as the person whom the driver had taken to the airport on October 23 (II Tr. 47). Thompson was thereafter arrested. Pursuant to a plea agreement, Thompson

[6]Whiteman also advised Rubio of his *Miranda* rights and spoke with him for one-half hour. Rubio was fingerprinted and allowed to leave the police station (I Tr. 67-69).

agreed to cooperate with the government and was interviewed by Stine in February, 1977.[7] Stine asked Thompson whether he knew petitioner, and Thompson replied that he had known him since December, 1975, and had participated in at least 14 smuggling ventures with him. (II Tr. 49-50, 53). Thompson also identified petitioner from the surveillance photographs taken at the Scottsdale residence (II Tr. 53).[8]

The court of appeals initially affirmed the suppression of evidence of the surveillance of the Scottsdale residence, including the photographs taken there, on the ground that this evidence was the fruit of petitioner's illegal arrest by the BIA police officer. The court reasoned (App. C *infra,* 26a):

> Stine exploited the illegal arrest of [petitioner] when he used information gathered during [petitioner's] detention to identify [petitioner] in Scottsdale. That identification played a large part in Stein's ordering the stakeout of that residence. Thus, the road from the illegal actions of the BIA to the evidence gained by surveilling was short and straight.

Following this Court's Order remanding the matter to the Ninth Circuit for reconsideration in light of *United States v. Crews, supra,* the Ninth Circuit totally changed its position and ruled that evidence of the surveillance of the Scottsdale residence was admissible.

The court also initially affirmed the suppression of any testimony by Thompson identifying Humphries as

[7]Thompson pled guilty to a state charge of unlawful possession of marijuana for sale.

[8]Stine also may have shown Thompson respondent's photograph taken by the BIA (II Tr. 62).

a participant in the offense (App. C *infra,*). Although it acknowledged that Stine's location of Thompson was untainted by Petitioner's arrest by the BIA police (*id.* at 19a and n.13), the court initially held that Thompson's testimony nevertheless had to be suppressed on the ground the "Thompson only implicated [petitioner] in the marijuana smuggling operation upon being asked specifically about him. And Stine questioned Thomspon specifically about [petitioner] only because of information [*i.e.* petitioner's identity] tainted by the illegal arrest" (*ibid*). The court's first opinion concluded that Thompson's testimony could not be deemed an act of free will that could dissipate the taint, because "Thompson answered Stine's questions as part of a "plea agreement' " (*ibid*).

However, after remand to the Ninth Circuit following this Court's Order, the Ninth Circuit reversed itself and held that Thompson's testimony was untainted by petitioner's arrest and that all testimony relating to Thompson was admissible.

REASONS FOR GRANTING THE PETITION

THIS CASE PRESENTS SEVERAL UNIQUE AND IMPORTANT QUESTIONS CONCERNING THE SCOPE AND APPLICATION OF THE EXCLUSIONARY RULE, THE FRUIT OF THE POISONOUS TREE DOCTRINE, AND THE DOCTRINE ESPOUSED IN *UNITED STATES v. CREWS*, THAT MERIT REVIEW BY THIS COURT.

ARGUMENT

I

DOES THE NINTH CIRCUIT COURT OF APPEALS' OPINION ERRONEOUSLY UTILIZE THE STANDARD SET FORTH IN *UNITED STATES v. CREWS*, 445 U.S. 463, 100 S. Ct. 1244 (1980), FOR LIVE WITNESS, IN-COURT IDENTIFICATION TESTIMONY AS THE STANDARD TO BE UTILIZED IN DETERMINING ADMISSABILITY OF NON-TESTIMONIAL, PHYSICAL EVIDENCE SUCH AS THE SURVEILLANCE PHOTOGRAPHS IN THE INSTANT MATTER.

In each Opinion issued by the Ninth Circuit [*United States v. Humphries*, 600 F. 2d 1238 (Ninth Circuit 1979)]; (*United States v. Humphries*, #78-1622, Opinion filed October 30, 1980), the Court noted that the surveillance of the Scottsdale residence was undertaken because of agent Stine's identification, both of Humphries and of an automobile.

In each case, the Ninth Circuit noted that *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407 (1963), announced the "appropriate test" as to whether evidence is inadmissible as a fruit of an unlawful police

action. The Court in each case expressed its concern for the balancing of Fourth Amendment rights against the cost of the Exclusionary Rule.

However, in its latest decision, the Ninth Circuit Court has erroneously reversed itself and held that, in light of *United States v. Crews,* 100 S. Ct. 1244 (1980), the Exclusionary Rule and the Fruit of the Poisonous Tree Doctrine do not bar the use of the evidence gained as a result of the surveillance of the Scottsdale resident. In its latest decision, the Ninth Circuit Court has applied the three-prong test of *Crews* to the use of this non-testimonial evidence.

Yet, *United States v. Crews, supra,* has no applicability to non-testimonial evidence. In its broadest sence, *Crews* concerns *testimonial* evidence, not physical evidence. Viewed narrowly, *Crews* only provides guidance in cases involving *"victims' "* testimony, not testimony of co-participants. (*See* discussion herein.)

It is therefore totally inappropriate to use the three-prong test given in *Crews* (relating to a victim's in-court identification) as the test used in analyzing the admissibility of non-testimonial, physical evidence which the Government may seek to introduce at trial.

Even assuming, *arguendo,* that the *Crews* analysis could properly be considered in relation to non-testimonial evidence, the *Crews* analysis was misapplied by the Ninth Circuit. *Crews* indicated that there are three elements of a victim's in-court identification testimony. These are: (1) the victim's presence in court; (2) the ability of the victim to identify the defendant as the perpetrator of the crime; and (3) the presence of the defendant in court.

Insofar as the first element, the "victim's" presence in

court, the Court correctly noted in its initial decision, (600 F. 2d 1238), that "Stine exploited the illegal arrest of Humphries when he used information gathered during Humphries' detention to identify Humphries in Scottsdale. That identification played a large part in Stine's ordering the stakeout of that residence. Thus, the road from the illegal action of the B.I.A. to the evidence gained by surveilling was short and straight." Thus, applying the *Crews* analysis, this "victim's" (the physical evidence) presence in court was obtained by exploiting the initial illegality.

Regarding the second factor enunciated in *Crews,* the ability of the "victim" to identify the defendant as the perpetrator of the crime, it should be again noted that this "victim" (the physical evidence - the photographs) exists only as an exploitation of the original illegality.

In short, the use of the *Crews* test as to non-testimonial, physical evidence is a total misapplication of the *Crews* rationale. Even assuming that such an analysis could be done, its application to the facts of this case would require suppression.

Finally, it should be noted that the Government conceded in its initial Petition for Writ of Certiorari to the United States Supreme Court at P. 12-13:

> "In our view, therefore, this Court's decision in *Crews* may well establish that the Court of Appeals incorrectly suppressed Thompson's testimony. The decision below, however, presents another distinct exclusionary rule issue — pertaining both to the suppression of Thompson's testimony and to the admissibility of photographs and other evidence derived from the surveillance of the Scottsdale residence. *At least as to the latter category of evidence, which is significant to this prosecution, the legal issues will not be resolved by the decision in Crews.* The issue is an

important one that independently merits this Court's plenary consideration."

ARGUMENT

II

DOES THE NINTH CIRCUIT COURT OF APPEALS' OPINION ERRONEOUSLY USE THE RATIONALE OF *UNITED STATES v. CREWS, SUPRA,* TO ERADICATE THE STANDARDS SET FORTH IN *UNITED STATES v. CECCOLINI,* 435 U.S. 263 (1968), CONCERNING THE ADMISSIBILITY OF NON-VICTIM, LIVE WITNESS, IN-COURT IDENTIFICATION TESTIMONY.

The Ninth Circuit Court holds that Thompson's in-court testimony identifying Humphries as a participant in criminal activity is admissible testimony under *United States v. Crews.* In so ruling, the Ninth Circuit Court has totally ignored, and thus impliedly reversed, the holding of *United States v. Ceccolini, supra.*

The Court's holding in *Crews* was strictly limited to "*victim*" witnesses: "A *victim's* in-court identification of the accused has three distinct elements." *Id.* at 1247.

While it is clear that the *Crews* Standard applied only to a "victim" witness, we are here concerned with an alleged co-participant witness who testifies only as the result of a plea agreement.

The Ninth Circuit Court's initial Opinion notes the distinctions between a non-participant witness and a co-participant witness. There is nothing within the language of *Crews* which in any way alters or curtails these distinctions nor is there language in *Crews* which would in any way overrule the rationale of *Ceccolini.*

The Ninth Circuit's well-reasoned initial Opinion properly applied the *Ceccolini* test to the facts at bar. However, the latest Ninth Circuit Opinion, relying as it does solely on *Crews,* clearly indicates the impracticability of applying the *Crews* test to the facts at bar. In the instant case, we are dealing with obviously biased testimony of a co-participant witness under the coercive effects of a plea bargain to aid the Government in return for personal gain. Moreover, here, the co-participant witness was never examined with regard to the effect on his testimony of the Government's use of tainted evidence and direct or indirect coercion.

For these reasons, it is urged that the Ninth Circuit was correct in its initial application of the *Ceccolini* test and its suppression of this evidence. This may not be the result when as in *Crews,* the Government calls the prospective witnesses for an examination concerning taint and coercion.

ARGUMENT

III

HAS THE NINTH CIRCUIT COURT OF APPEALS IMPROPERLY ALTERED FACTUAL FINDINGS AND RELIED UPON SPECULATION RATHER THAN FACTS DEMONSTRATED IN THE RECORD IN ARRIVING AT ITS CONCLUSIONS.

The Ninth Circuit utilizes the three-prong test found in *Crews* to analyze the admissibility of Thompson's testimony. The Ninth Circuit notes that under this Court's analysis in *Crews,* the second prong of the test would be whether the victim's "courtroom identification rested on an independent recollection . . .

uninfluenced by the tainted pre-trial identifications . . ." (I.D. at 1251). The Ninth Circuit notes that there was no evidence presented on this issue. However, the Court then proceeds to rule that there could be no other finding but that Thompson's identification of Humphries is based on his independent recollection, uninfluenced by the pre-trial identification procedures, since as a co-conspirator, Thompson would have intimate knowledge of Humphries' involvement in this alleged conspiracy. The Court states that this knowledge antedated police misconduct and there is therefore no danger that any suggestiveness in the pre-trial identification procedures would render his in-court identification unreliable. The Ninth Circuit concluded that Thompson's ability to identify the defendant in court has therefore not been come at by exploitation of Humphries' illegal arrest.

This is speculation. The record below is clear that although invited to call Thompson as a witness in this matter, the Government declined to do so. As has been previously noted, Judge Davies felt that that was the "gut issue." (I Tr. p.89; p.85-99).

The Government had two opportunities to present such testimony. The Government failed to do so. It is improper for the Ninth Circuit to now speculate as to what that testimony would have been and to utilize this speculation so as to satisfy the second prong of the *Crews* test.

In this regard, the Court's attention is directed to the final paragraph of the Majority Opinion in *Crews*. Justice Brennan noted:

> ". . . but the in-court identification is *admissible*, even if petitioner's argument be accepted, *because* the *police's knowledge* of petitioner's identity *and* the *victim's independent recollection* of him *both antedated the*

unlawful arrest and were thus untainted by the constitutional violation."

Comparing those elements to the present case, the police's knowledge of Humphries' identity was obtained only as a result of the initial illegality. The victim's independent recollection (in this case, an alleged co-participant) was not demonstrated to have antedated the unlawful arrest. There was simply no evidence presented either the District Court or the Ninth Circuit Court as to this issue.

The Government alleges that Thompson is a co-participant with Humphries but there was no evidence presented the District Court by Thompson that he was in fact the co-participant or, for that matter, a participant in the crime alleged. There was no testimony by Thompson as to the basis for Thomspon's proposed in-court identification nor the methods utilized by the Government in obtaining his proposed testimony.

These factors all distinguish the case at bar from *Crews* and *Ceccolini* in that here, the question is not only the proper legal test, but is rather, the effect of the failure of proof by the Government to satisfy the criteria of either test.

An evidentiary hearing was held in *Crews* wherein the witness whose testimony the defense sought to suppress was examined and cross-examined with regard to the issue of taint and with regard to the issue of independent recollection. In this case, the Government chose not to call its witness, Thomspon, to testify although the record indicates that the witness was in the building and available to testify at the time of the evidentiary hearings.

The Government was invited by Judge Davies to produce such evidence and chose not to do so. (II Tr. p. 89; p. 85-99).

In these circumstances, it is improper for the Court to speculate what such evidence would be so as to make the ruling that the witness' testimony was admissible.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED this 1st day of April, 1981.

HOFFMAN AND BROWN,

DAVID S. HOFFMAN

David S. Hoffman

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Pima)

I, DAVID S. HOFFMAN, hereby certify that on this 1st day of April, 1981, copies of the foregoing Petition for Writ of Certiorari were mailed to:

A. Bates Butler, III
United States Attorney
District of Arizona

Wade H. McCree, Jr.
Solicitor General
Department of Justice
Washington, D.C. 20530

DAVID S. HOFFMAN

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 78-1662

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

V.

JOHN RICHARD HUMPHRIES, DEFENDANT-APPELLEE

October 30, 1980

OPINION

C.A. Muecke, Chief District Judge, Presiding, Argued and Submitted August 17, 1978.

Before: CHOY and SNEED, Circuit Judges, and KELLEHER,* District Judge.

CHOY, Circuit Judge:

The United States Supreme Court vacated the judgment of our court, *United States v. Humphries,* 600 F. 2d 1238 (9th Cir. 1979), and remanded the case to us for further consideration in light of *United States v. Crews,* 445 U.S.; 100 S.Ct. 1244 (1980). We have done so and now issue this revised opinion.

This is an appeal from the district court's denial of the Government's "Motion for Determination of Admissibility of Evidence" and further order that "all evidence concerning the identity and participation of defendant HUMPHRIES in this case is suppressed." We reverse and remand.

I. *STATEMENT OF THE CASE*

On April 20, 1977, an indictment was returned against appellee Richard Humphries and four others and was filed in the United States District Court for the District of Arizona. The indictment charged each of the defendants with conspiracy to import marijuana, conspiracy to distribute marijuana, importation of marijuana, and attempt to possess marijuana with intent to distribute it.[1]

Humphries moved for an order suppressing his identity "as a defendant in this matter and any and all other physical evidence and statements obtained as a result of the illegal arrest of [Humphries] in this matter." Judge Muecke heard the argument on Humphries' motion and granted that motion on January 26, 1978.

On February 3, the Government moved for a "Determination of Admissibility of Evidence." This second motion was heard by Judge Davies, who denied it on February 17, ordering that

> all evidence concerning the identity and participation of defendant HUMPHRIES in this case is suppressed for the reason that the Plaintiff has not shown that any of said evidence is derived from a source other than the illegal arrest of defendant HUMPHRIES.

The Government appeals from this second order. On May 25, two members of this court denied Humphries' motion to dismiss the appeal for failure to file timely notice of appeal.[2]

*The Honorable Robert J. Kelleher, United States District Judge for the Central District of California, sitting by designation.

II. *JURISDICTION*

Humphries contends that this court is without jurisdiction over the United States' appeal in this case. He urges that the Government has attempted to circumvent the requirements of 18 U.S.C. § 3731 by moving for a "Determination of Admissibility" and appealing within 30 days after the district court's initial decision on Humphries' suppression motion. We hold that we have jurisdiction to hear this appeal.

The courts often have been called upon to construe 18 U.S.C. § 3731, the Criminal Appeals Act.[3] Of their decisions, Professors Wright and Miller have said:

> Appeals [under § 3731] are clearly allowed from interlocutory orders suppressing or excluding evidence or requiring the return of property, in marked contrast to the rules governing appeals by criminal defendants or witnesses.

[1]18 U.S.C. § s, 21 U.S.C. §§ 841(a) (1),841(b), 846, 952(a), 960(a) (1), 960(b), 963.

[2]While the motion panel was presented with the merits of the jurisdictional issue in this case, we do not consider their denial of Humphries' motion to dismiss the appeal to have foreclosed our ultimate reconsideration and disposition. *See* United States v. Emens, 565 F. 2d 1142, 1144 n.2 (9th Cir. 1977).

[3]In relevant part, § 3731 provides:

> An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts [sic] suppressing or excluding evidence . . . not made after the defendant has been put in jeopardy and before the verdict or finding . . .
>
> The appeal shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.
>
> The provisions of this section shall be liberally construed to effectuate its purpose.

15 Wright & Miller, Federal Practice and Procedure § 3919, at 656; (footnote omitted); *see e.g., United States v. Donovan,* 429 U.S. 413, 421 n.8 (1977); *United States v. Martinez-Fuerte,* 514 F. 2d 308, 310 (9th Cir. 1975), *rev'd on other grounds,* 428 U.S. 543 (1976).

Section 3731 is broadly construed, for its legislative history makes it clear

> that Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit.

United States v. Martin Linen Supply Co., 430 U.S. 564, 568 (1977) (quoting *United States v. Wilson,* 420 U.S. 332, 337 (1975).[4] The only limitation on Government appeals under § 3731 is the double jeopardy clause of the United States Constitution. *United States v. Rojas,* 554 F 2s 938, 941 (9th Cir. 1977), *supplemented,* 574 F. 2d 476 (9th Cir. 1978); *see* note 4 *supra.*

Humphries contends that the Government's appeal is not properly before this court because it is a "Motion to Determine the Admissibility of Evidence" and not within the express language of § 3731. Humphries does not argue that the Government's appeal here violates the constitutional prohibition against placing him twice in jeopardy.

To hold that the order here is not appealable under § 3731 because a denial of a "Motion to Determine the Admissibility of Evidence" is not a "decision . . . supressing or excluding evidence" is to focus on the title of the Government's motion rather than the effect of the district court's order. Such an approach flies in the face of the intent of Congress and is contrary to consistent judicial authority. Section 3731 must be construed broadly; a Government appeal should not be rejected on a hypertechnical jurisdictional ground.

Thus, we refuse to limit the Government's right to appeal under § 3731 solely because of the title of its motion. Instead, we "focu[s] on the effect of the ruling sought to be appealed." *United States v. Martin Linen Supply Co.*, 534 F. 2d 585, 587 n.3 (5th Cir. 1976), *aff'd*, 430 U.S. 564 (1977); *see United States v. Wilson*, 420 U.S. 332.

Humphries alternatively argues that the Government has in fact appealed from the January 26 order of Judge Muecke; that the Government's "Motion to Determine the Admissibility of Evidence" and its

[4] Congress has said of § 3731:

> The amended Criminal Appeal[s] Act [§ 3731] is intended to be liberally construed so as to effectiate its purpose of permitting the Government to appeal from dismissals of criminal prosecutions by district courts in all cases where the Constitution permits, and from all suppressions and exclusions of evidence in criminal proceedings, except those ordered during trial of an indictment or information.

S. Rep. No. 1296, 91st Cong., 2d Sess. (1970), at 18. "The phrase 'suppressing or excluding evidence . . .' should be read broadly, not narrowly as a similar statutory term has been interpreted." *Id.* at 37, *citing* United States v. Greely, 413 F. 2d 403 (D.C. Cir. 1969) (refusal of trial court to reopen suppression hearing is not "order, granting . . . a motion to suppress evidence" under earlier version of § 3731) as exemplifying improper narrow construction.

The conference report on the Omnibus Crime Control Act, Pub. L. No. 91-644, recognized that the Senate version of § 3731 eliminated "[t]echnical distinctions in pleadings as limitations on appeals by the United States," H.R. Rep. No. 1768, 91st Cong., 2d Sess. (1970), at 21. It continued:

> The conference substitute conforms to the Senate amendment except that it provides that an appeal by the United States shall lie to a court of appeals from a decision, judgment or order of a district court dismissing an indictment or information . . . but that no appeal shall lie in any case in which the Double Jeopardy Clause of the United States Constitution prohibits further prosecution.

Id.

appeal from Judge Davies' order denying that motion were merely an attempt to circumvent the time limits on appeals under § 3731.

> Judge Muecke's order granted Humphries' motion that the identity of JOHN RICHARD HUMPHRIES as a defendant in this matter and any and all other physical evidence and statements obtained as a result of the illegal arrest of the defendant [be suppressed] in this matter.

His decision did not elaborate on what evidence was covered by his order; the opinion merely addressed the illegality of the arrest or detention of Humphries.

The Government made its "Motion to Determine the Admissibility of Evidence" eight days after Judge Muecke entered his order. The Government did not challenge Judge Muecke's order; instead it sought only a decision on whether "certain identification evidence concerning defendant HUMPHRIES" was admissible under the previous order. A careful review of the transcripts and record in this case indicates that there was considerable confusion as to the scope of Judge Muecke's ruling[5] and that the testimony presented in the hearing before Judge Davies on the Government's motion was significantly different from that presented to Judge Muecke on the previous motion.[6]

[5] Humphries has argued both to this court and below that the Government's motion was only an attempt to relitigate matters covered by Judge Muecke's order. The Government has countered that its motion was aimed at determining whether certain evidence was obtained as a result of the illegal arrest of Humphries and thus excluded under Judge Muecke's order.

In arguing its position, the Government points out a statement made by Humphries' counsel during the hearing before Judge Muecke:

> Then, of course, we run into the problem, going down the line, as to what is or what is not tainted . . .

Yet the order of Judge Muecke merely granted the motion by Humphries that all identification evidence as to him be suppressed. We find that the transcript of the hearing before

Judge Davies further indicates the confusion of the parties and the court:

> THE COURT: Gentlemen, the reason I asked you to come in, I think I know of a way to solve this thing, deny the government's motion and let them appeal it. I don't think we are going to try this case only once and in its present posture. And that way I get a chance to find out if there is any doubt about Judge Muecke's order as well.
>
> MR. NOYES: I think if the Court is troubled by it, that is possibly the better thing to do than proceed with the trial.
>
> THE COURT: I am troubled by it, you bet. It is going to be extremely difficult to try it in the posture of this case in view of the order and the different interpretations you gentlemen place on it.
>
> THE COURT: Clearly counsel will be up more time on his feet than in his cair, objecting.
>
> MR. HOFFMAN: I don't see how I can sit down. And I brought along uncomfortable shoes.
>
> THE COURT: I believe that is the best way. Do you see any other —
>
> MR. HOFFMAN: I don't, Your Honor.
>
> THE COURT: The motion is denied.

[6]In the hearing on Humphries' Motion to Suppress, the Government presented the following evidence: (1) the testimony of Frank Sisto that he had picked up two men and taken them to the tribal store in San Carlos to await a ride home and that Humphries, seated in the courtroom, was one of those men and (2) the testimony of Everett Little Whiteman, Special Office for the Bureau of Indian Affairs, concerning the illegal arrest or detention, photographing and fingerprinting of Humphries. In support of his motion, Humphries called Douglas R. Stine, an agent of the Arizona Department of Public Safety, Narcotics Enforcement Division, who testified that his part in the investigation of this case included investigating some telephone calls from a suspect in the case to a certain address in the Phoenix area, and that in surveilling that address he identified Humphries from a driver's license photograph he had previously obtained because Agent Little Whiteman had given him Humphries' name.

In the hearing on the Government's motion before Judge Davies, the Government elicited testimony of an entirely different nature, even though the same individuals testified. The

Given the confusion surrounding the earlier order, and that the Government indeed presented different evidence in the hearing on its motion, we cannot agree with Humphries that the Government's actions were calculated to circumvent the requirements of the Criminal Appeals Act.[7] The Government's appeal is one from Judge Davies' order suppressing all evidence relating to Humphries. Such an appeal is proper under § 3731 and was timely filed.[8] We thus have jurisdiction over this appeal.

evidence in the second hearing concerned the discovery of the crash site by Agent Little Whiteman and his follow-up investigation leading to the identification of James Thompson, the pilot of the downed plane. Agent Stine testified that based on this information, which Little Whiteman gave him, and because Little Whiteman supplied Stine with Humphries' name, Stine staked out a certain address called by Thompson, identified Humphries at that address, took a photograph of Humphries at that address, and asked Thompson whether he knew Humphries and about Humphries' involvement in the marijuana smuggling operation.

Clearly, then, the evidence presented to Judge Davies in the hearing on the Government's motion did not merely duplicate that heard by Judge Muecke. Thus it does not appear to us that the Government was merely attempting to relitigate matters already determined in Judge Muecke's order. Judge Davies recognized this fact when he said,

> The government may, in view of this Court, produce independent, nonrelated, untainted evidence [of Humphries' identity] in these proceedings that is not at all void by the order moved by Judge Muecke . . .

and when he made it clear that his denial of the Government's motion was based not on the ground "that it was encompassed by Judge Muecke's order" but on the ground that the Government had failed to meet the Ninth Circuit requirements as to its burden of showing that the evidence offered was not tainted by the illegal arrest/detention. We agree with Judge Davies' position that the Government's motion was not foreclosed by Judge Muecke's ruling.

III. *Suppression of Evidence*

Judge Davies ordered that all evidence concerning Humphries' identity and participation in the marijuana smuggling operation in this case be suppressed. The Government appeals from this order only as to three categories of evidence: (1) the testimony of Frank Sisto; (2) evidence gained as the result of the surveillance of a residence in Scottsdale, Arizona; and (3) the testimony of James "Bullet" Thompson, the alleged pilot of the crashed marijuana-laden plane involved in this case.

A. *Sisto's Testimony*

Frank Sisto testified that on the evening of October 23, 1976, he met two strangers at the home of his

[7]Even if we assume, *arguendo,* that Humphries is correct in characterizing the Government's motion and appeal from Judge Davies' order as an attempt to relitigate a matter already decided by Judge Muecke, and that he is correct in his contention that the appeal is in fact one from the order of Judge Muecke, this appeal would not be barred by the 30-day limitation contained in § 3731. That limitation period is not jurisdictional. Meier v. Keller, 521 F. 2d 548, 553 (9th Cir. 1975), *cert. denied,* 424 U.S. 943 (1976). Although appeals after the 30-day period are "not to be regarded with favor," *id.,* where, as here, there is no showing of bad faith on the part of the Government in delaying the appeal, no prejudice has resulted to any party, and the Government appears to be prosecuting the case diligently, this court may exercise jurisdiction over an appeal under § 3731. The Government should not be penalized for providing the district court with an opportunity to reconsider its earlier decision, especially when there appears to be a great deal of confusion about the meaning of that decision.

[8]Judge Davies' order was entered on February 17, 1978. The Government filed its appeal with this court on March 17, 1978, within the 30-day limit of § 3731.

daughter, just north of San Carlos, Arizona.[9] One of the men introduced himself as "Tony" and explained that their truck had broken down about three miles north of the residence. He asked to use the telephone to call his wife to pick them up. When Sisto gave his permission to use the phone, "Tony" asked where the best place to wait for his wife would be. Sisto suggested the San Carlos police station but "Tony" said that he did not wish to wait there. Sisto then suggested the tribal store in San Carlos and offered to give the two men a ride to that point. "Tony" accepted Sisto's offer. After taking the two men to the store, Sisto called the police station because he was "worried" and had a "funny feeling" about them.

Sisto's message was passed along to Bureau of Indian Affairs (BIA) Special Agent Little Whiteman, who was investigating a downed aircraft loaded with marijuana near the area where Sisto initially saw the two men. Little Whiteman ordered one of his officers to go to the tribal store to see if the two were still there. Upon receiving word that the two men were still at the tribal store, Little Whiteman ordered them brought in for questioning. This detention was held an illegal arrest by Judge Muecke.[10]

In court Sisto pointed to Humphries as one of the men to whom he had given a ride. His testimony and identification were based solely on his contact with Humphries and his codefendant, Richard Rubio ("Tony") prior to the unlawful arrest. It is not in any way a "fruit" of that unlawful arrest. *See United States v. Williams,* 436 F. 2d 1166, 1170 (9th Cir. 1970), *cert. denied,* 402 U.S. 912 (1971). Thus, we reverse Judge Davies' order insofar as it suppresses Sisto's testimony.[11]

B. *The Surveillance Evidence*

Agent Little Whiteman testified before Judge Davies concerning the discovery of a downed airplane containing a large quantity of marijuana. He related the discovery of papers in the plane and his follow-up investigation which led to the identification of James "Bullet" Thompson as the pilot of that aircraft. This information, along with information obtained during the illegal arrest and detention of Humphries (name, address, fingerprints and photograph), was eventually passed to Agent Stine of the Arizona Department of Public Safety, Narcotics Enforcement Divison (DPS). Little Whiteman also gave Stine the description and license number of a beige 1971 Chevrolet Monte Carlo that he had stopped near the crash site.

On the basis of this information, Stine obtained a

[9]San Carlos is wholly within an Apache Indian Reservation. The police organ in San Carlos is headed by Bureau of Indian Affairs Special Agent Everett Little Whiteman.

[10]The Government does not take issue with Judge Muecke's ruling that the San Carlos detention of Humphries was an illegal arrest.

[11]Humphries argues that the Government is barred from contesting the suppression of Sisto's testimony as Sisto did not testify before Judge Davies. However, Sisto did testify before Judge Muecke. As we have indicated *supra,* Judge Muecke's order left the parties in some confusion over what evidence had in fact been suppressed. In the memorandum accompanying the Government's motion, essentially one to determine the scope of Judge Muecke's order, it was argued that Sisto's testimony was free of the taint of the illegal arrest of Humphries.

Thus, the issue of the admissibility of Sisto's testimony was squarely before Judge Davies. We do not believe that it is necessary that Sisto have testified before Judge Davies for this court to review the suppression of his testimony, given the procedural posture of the Government's motion below.

driver's license photograph of Humphries and proceeded to attempt to locate the pilot, Thompson, by investigating a Scottsdale address called by Thompson while he was in Chicago. Arriving at the Scottsdale residence, Stine noticed a beige Monte Carlo in the driveway. Unable to read the license plate from the street, he drove up the driveway and positively identified the auto as the one stopped by Little Whiteman. He also noticed two persons at the residence while in the driveway, one of whom he identified as Humphries from the driver's license photo in his possession.

Relying on the information from Little Whiteman and his observations while in the driveway, Stine ordered around-the-clock surveillance of the Scottsdale address. During the course of their stakeout, DPS agents photographed Humphries and others at the residence.

*In the hearing before Judge Davies, the Government stipulated that it would not introduce evidence concerning the identification of Humphries made by Stine in the driveway of the Scottsdale residence. Therefore, we are concerned only with the admissibility of the license number of the Monte Carlo and the photographs and other evidence garnered as a result of the surveillance of the residence.

1. *Identification of the automobile in Scottsdale*

The license plate number and description of an automobile which Stine had when he spotted the car in Scottsdale and entered the driveway to check the license plate of that car was derived from a stop of a vehicle by BIA agents. The legality of that stop is unchallenged in this case. Moreover, the stop was wholly unrelated to the illegal arrest of Humphries.

Thus, the BIA information concerning the auto stopped near the crash site was untainted; its use by Stine was not improper.

However, Humphries points out that Stine matched the license plate number of the car in Scottsdale with the number in his possession only by trespassing onto a private driveway. Judge Davies' order and opinion, holding as it did that the license number identification was tainted by Humphries' illegal arrest, did not reach Humphries' trespass theory. Since we have concluded that the illegal arrest of Humphries did not taint the BIA information concerning the auto stopped near the crash site, we must reach this claim.

In *Katz v. United States,* 389 U.S. 347 (1967). the Supreme Court noted that "[t]he premise that property interests control the right of Government to search and sieze has been discredited." *Id.* at 353, (quoting *Warden v. Hayden,* 387 U.S. 294, 304 (1967). It concluded that "the Fourth Amendment protects people, not places." *Id.* at 351; *see Warden v. Hayden,* 387 U.S. at 304 ("the principal object of the Fourth Amendment is the protection of privacy rather than property"). "[T]he reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion . . ." *Katz v. United States,* 389 U.S. at 353.

Only when there is an invasion of some reasonable expectation of privacy can police action constitute a search subject to the strictures of the fourth amendment. *See United States v. Santana,* 427 U.S. 38, 42 (1976); *Katz v. United States,* 389 U.S. at 349-53. Although a driveway may be private under common law notions of property, it may not be for the purposes of the fourth amendment. *See United States v. Santana,* 427 U.S. at 42 (doorway of private home a

"public place" where visible from street); *United States v. Hersh,* 464 F. 2d 228, 230 (9th Cir. 1972) (officers going upon front porch of house and looking into window did not violate fourth amendment privacy rights).

Considering all of the circumstances surrounding Stine's entry into the driveway and identification of the Monte Carlo as the automobile previously stopped by BIA agents near the crash site, we conclude that the entry and identification did not violate any reasonable expectation of privacy held by Humphries. The auto was visible from the street. It does not appear from the record that the driveway was enclosed by a fence, shrubbery or other barrier. Stine did not move bushes or other objects in order to make his observations. *See United States v. Hersh,* 464 F. 2d at 230; *United States v. Davis,* 327 F. 2d 301, 303-04 (9th Cir. 1964). Moreover, a license plate is affixed on an automobile for the very purpose of allowing identification of it by law enforcement agencies and others.[12]

Thus, Stine's conduct did not constitute a search subject to fourth amendment limitations. His testimony regarding his identification of the car was improperly suppressed. We reverse Judge Davies' order insofar as it suppresses that testimony.

[12]We do not today hold that the license number of an automobile is never protected by the fourth amendment. Instead, we only recognize that the nature of a license plate, something designed specifically for identification pruposes, affects the reasonableness of expectations of privacy concerning it. In this case, all of the circumstances surrounding Stine's actions indicate that Humphries had no reasonable expectation of privacy as to the license number of the auto parked in the Scottsdale driveway. The nature of the license plate is only one factor in our decision.

2. Photographs and other surveillance evidence

Agent Stine testified that the surveillance of the Scottsdale residence was undertaken because of his identifications both of Humphries and of the automobile, while Stine was in the driveway of that address. Initially, however, he was investigating that address because Thompson made a telephone call to there from Chicago.

In *Wong Sun v. United States,* the Supreme Court announced the appropriate test of whether evidence is inadmissible as the fruit of unlawful police action:

> Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

371 U.S. 471, 488 (1963), (quoting Maguire, Evidence of Guilt 221 (1959). Exploitation of illegalities is the focus of the fruit doctrine for the reason that the exclusionary rule is aimed at deterring police conduct in violation of the fourth amendment "in the only effectively available way — by removing the incentive to disregard it." *Stone v. Powell,* 428 U.S. 465, 484 (1976), (quoting *Elkins v. United States,* 364 U.S. 206, 217 (1960)).

Concern for fourth amendment rights must be balanced against the costs of the exclusionary rule, for

> [a]pplication of the rule . . . deflects the truthfinding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied

> indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice.

Id. at 490-91 (footnotes omitted).

Balancing our concern for the protection of Humphries' fourth amendment rights against our concern for the truth, and in light of *United States v. Crews,* 100 S. Ct. 1244 (1980), we hold that the exclusionary rule and the fruit-of-the-poisonous-tree doctrine do not bar the use of any of the evidence gained as a result of the surveillance of the Scottsdale residence. Applying the three-part test in *Crews* (see section C *infra*), the Supreme Court held that information antedating an unlawful arrest is not necessarily tainted by the unlawfulness of the sugsequent arrest. Although Stine used information gathered during Humphries' detention to identify Humphries in Scottsdale, he also based his decision to set up a surveillance of the house on the identification of the automobile and, undoubtedly (since Stine ordered surveillance of the house, not of Humphries), also on the connection of the Scottsdale residence to Thompson, both of which facts were obtained from independent sources available before the illegal arrest. The reliability of the evidence obtained from the surveillance was not infected by the tainted identification of Humphries. Furthermore, just as Humphries is not immune from prosecution because of the initial illegal arrest, so too is he not immune from investigation merely because of the illegal arrest. Because there was an independent basis for setting up the surveillance of the house, we find that is was error to suppress the photoghraphs and other evidence obtained from the surveillance. *See United States v. Crews,* 100 S.Ct. at 1246-47; *Silverthorne Lumber Co.*

v. United States, 21 U.S. 385, 392 (1920).

C. *Thompson's Testimony*

James "Bullet" Thomspon was located by Agent Stine from information discovered by BIA agents investigating the crashed airplane near San Carlos.[13] There was no taint from the illegal arrest attaching to Stine's location of Thompson. Once located, however, Thompson implicated Humphries in the marijuana smuggling operation only upon being asked specifically about him. And Stine questioned Thompson specifically about Humphries because of information tainted by the illegal arrest.[14]

[13]BIA agents discovering the downed aircraft located a motel receipt inside the cockpit in Thompson's name. They also received information from a truck driver who took a man from the area of the crash to the local airport. The airport manager told them that the hitchhiker had called a taxi and in checking with the motel to which the taxi took the hitchhiker, they discovered his name: James "Bullet" Thompson. In following up these leads, Stine located Thompson. It therefore appears that Stine's discovery of Thompson was in no way related to the illegal arrest of Humphries.

[14]Stine claims to have had knowledge of Humphries' identity and possible involvement in the smuggling venture through two separate sources. The first of these was through information obtained during the illegal arrest of Humphries.

Humphries' name had also entered the investigation when BIA agents stopped Lon Raymond Jordan near the crash site. Stine knew Jordan to have been arrested for drug-related offenses in the past. He therefore obtained a list of Jordan's known associates, among whom was Humphries.

In response to questioning by defense counsel, Stine testified that Jordan had "[r]oughly 30 to 40" known associates all of whom were "checked out." Driver's license pictures of each were compared to photos taken during the surveillance of the house in Scottsdale.

The BIA information about Humphries was obtained during the arrest, while the Bia information concerning Jordan indicated that Humphries was a suspect only when the pictures of Jordan's associates were compared with pictures taken during the surveillance.

The trial court suppressed not only this pretrial identification of Humphries, but also Thompson's in-court testimony identifying Humphries as a participant in the smuggling operation. Under *United States v. Crews*, 100 S.Ct. 1244 (1980), however, Thompson's in-court testimony is admissible and should not have been suppressed.

In *Crews*, the defendant was illegally arrested and photographed. A victim identified the defendant from this photograph and later picked him out of a lineup. These pretrial identifications were suppressed, but the victim's courtroom identification was held admissible. *Id.* at 1250.

There are three elements of in-court identification testimony, the Court held: (1) the witness' presence in court, (2) the ability of the witness to identify the defendant as the perpetrator of the crims, and (3) the presence of the defendant in court. *Id.* The test for admissibility is whether any of these elements "'has been come at by exploitation' of the violation of the defendant's Fourth Amendment rights." *Id.*, (quoting *Wong Sun*, 371 U.S. at 488.)

1. *Thompson's presence in court*

We have already held that the location of Thompson as a witness was not tainted in any way by Humphries' illegal arrest. Thus, his presence in court was unobjectionable.

2. *Thompson's ability to identify Humphries*

Under the Supreme Court's analysis in *Crews*, the

question here is whether "the witness' courtroom identification rested on an independent recollection . . . uninfluenced by the [tainted] pretrial identifications . . ." *Id.* at 1251. The Court upheld the trial court's affirmative finding on this question. *Id.* & n.18.

Although the district court here did not reach this issue and therefore made no such finding, under the circumstances of this case there can be no other finding but that Thompson's identification of Humphries is based on his independent recollection, uninfluenced by the pretrial identification procedures. As a co-conspirator, Thomspon has intimate knowledge of Humphries' involvement in the conspiracy; this knowledge antedated any police misconduct. And there is no danger that any suggestiveness in the pretrial identification procedures would render Thompson's in-court identification unreliable. *See id.* at 1250.

Thus, as in *Crews,* even though the witness' pretrial identification of the defendant was based on information and photographs obtained from the defendant's illegal arrest, the witness' ability to identify the defendant in court "has not been come at by exploitation" of that illegal arrest.

3. *Humphries' presence in court*

A majority of the Supreme Court in *Crews* agreed that under *Frisbie v. Collins,* 342 U.S. 519 (1952), the defendant's presence in the courtroom cannot be attacked as the fruit of an illegal arrest. 100 S.Ct. at 1253-54 (White, J., concurring in the result); *id.* (Powell, J., concurring in part).

Thus, all three elements satisy the *Crews* test and Thompson's in-court testimony identifying Humphries as a member of the marijuana smuggling conspiracy is admissible.

IV. *Conclusion*

Sisto's testimony and Thompson's testimony are not fruits of Humphries' illegal arrest. Each was available and admissible because it was based upon independent recollections of pre-arrest events. Furthermore, the surveillance was based upon the identifications, from independent sources,of the Scottsdale residence and of the beige Monte Carlo, and thus, the evidence obtained therefrom was admissible. We reverse the order suppressing the evidence and remand for proceedings consistent with this opinion.

REVERSED and REMANDED FOR FURTHER PROCEEDINGS.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 78-1622

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JOHN RICHARD HUMPHRIES, DEFENDANT-APPELLEE

Feb. 6, 1981

ORDER

Before CHOY and SNEED, Circuit Judges and KELLEHER*, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has voted to grant rehearing en banc. F.R. App. P. 35(b)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*The Honorable Robert J. Kelleher, United States District Judge for the Central District of California, sitting by designation.

APPENDIX C

OPINION

Jan. 19, 1979

(The first 10 pages of both Opinions by the Ninth Circuit Court of Appeals are identical. Attached hereto is the point at which the first Opinion departs from that of the second Opinion on page 12 of Appendix A at*.)

In the hearing before Judge Davies, the Government stipulated that it would not introduce evidence concerning the identification of Humphries made by Stine in the driveway of the Scottsdale residence. Therefore, we are concerned only with the admissibility of the license number of the Monte Carlo and the photographs and other evidence garnered as a result of the surveillance of the residence.

1. *Identification of the Automobile in Scottsdale*

The license plate number and description of an automobile which Stine had when he spotted the car in Scottsdale and entered the driveway to check the license plate of the car was derived from a stop of a vehicle by BIA agents. The legality of that stop is unchallenged in this case. Moreover, the stop was wholly unrelated to the illegal arrest of Humphries. Thus, the BIA information concerning the auto stopped near the crash site was untainted; its use by Stine was not improper.

However, Humphries points out that Stine matched the license plate number of the car in Scottsdale with the number in his possession only by trespassing onto a private driveway. Judge Davies' order and opinion, holding as it did that the license number identification was tainted by Humphries' illegal arrest, did not reach Humphries' trespass theory. Since we have concluded

that the illegal arrest of Humphries does not taint the BIA information concerning the auto stopped near the crash site, we must reach this claim.

In *Katz v. United States,* 389 U.S. 347, 88 S.CT. 507, 19 L.ED. 2d 576 (1967), the Supreme Court noted that "[t]he premise that property interests control the right of the Government to search and seize has been discredited." *Id.* at 353, 88 S.CT. at 512, *quoting Warden v. Hayden,* 387 U.S. 294, 304, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967). It concluded that "the Fourth Amendment protects people, not places." *Id.* at 351, 88 S.Ct. at 511; *see Warden v. Hayden,* 387 U.S. at 304, 87 S.Ct. at 1648 ("the principal object of the Fourth Amendment is the protection of privacy rather than property"). "[T]he reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrustion . . ." *Katz v. United States,* 389 U.S. at 353, 88 S.Ct. at 512.

Only when there is an invasion of some reasonable expectation of privacy can police action constitute a search subject to the strictures of the fourth amendment. *See United States v. Santana,* 427 U.S. 38, 42, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976); *Katz v. United States,* 389 U.S. at 349-53, 88 S.Ct. 507. Although a driveway may be private under common law notions of property, it may not be for purposes of the fourth amendment. *See United States v. Santana,* 427 U.S. at 42, 96 S.Ct. 2406 (doorway of private home a "public place" where visible from street); *United States v. Hersh,* 464 F.2d 228, 230 (9th Cir. 1972) (officers going upon front porch of house and looking into window did not violate fourth amendment privacy rights).

Considering all of the circumstances surrounding Stine's entry into driveway and identification of the

Monte Carlo as the automobile previously stopped by BIA agents near the crash site, we conclude that the entry and identification did not violate any reasonable expectation of privacy held by Humphries. The auto was visible from the street. It does not appear from the record that the driveway was enclosed by a fence, shrubbery or other barrier. Stine did not move bushes or other objects in order to make his observations. *See United States v. Hersh,* 464 F.2d at 230; *United States v. Davis,* 327 F.2d 301, 303-04 (9th Cir. 1964). Moreover, a license plate is affixed on an automobile for the very purpose of allowing identification of it by law enforcement agencies and others.[12]

Thus, Stine's conduct did not constitute a search subject to fourth amendment limitations. His testimony regarding his identification of the car was improperly suppressed. We reverse Judge Davies' order insofar as it suppresses that testimony.

2. *Photographs and Other Surveillance Evidence*

Agent Stine testified that the surveillance of the Scottsdale residence was undertaken because of his identification of Humphries and the automobile while he was in the driveway of that address. The surveillance and all evidence derived from it is tainted by the illegal arrest of Humphries.

In *Wong Sun v. United States,* the Supreme Court

[12]We do not today hold that the license number of an automobile is never protected by the fourth amendment. Instead, we only recognize that the nature of a license plate, something designed specifically for identification purposes, affects the reasonableness of expectations of privacy concerning it. In this case, all of the circumstances surrounding Stine's actions indicate that Humphries had no reasonable expectation of privacy as to the license number of the auto parked in the Scottsdale driveway. The nature of the license plate is only one factor in our decision.

announced the appropraite test of whether evidence is inadmissible as the fruit of unlawful police action:

> Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

371 U.S. 471, 488, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963), *quoting* Maguire, Evidence of Guilt 221 (1959). Exploitation of illegalities is the focus of the fruits doctrine for the reason that the exclusionary rule is aimed at deterring police conduct in violation of the fourth amendment "in the only effectively available way — by removing the incentive to disregard it." *Stone v. Powell,* 428 U.S. 465, 484, 96 S.Ct. 3037, 3047, 49 L.Ed.2d 1067 (1976), *quoting Elkins v. United States,* 364 U.S. 206, 217, 80 S.Ct. 1437, 4L.Ed.2d 1669 (1960).

Concern for fourth amendment rights must be balanced against the costs of the exclusionary rule, for

> [a]pplication of the rule . . . deflects the truthfinding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice.

Id. at 490-91, 96 S.Ct. at 3050 (footnotes omitted).

Balancing our concern for the protection of Humphries' fourth amendment rights against our concern for the truth, we find that the exclusionary rule and the fruits of the poisonous tree doctrine bar the use

of any and all evidence gained as a result of the surveillance of the Scottsdale residence. Stine exploited the illegal arrest of Humphries when he used information gathered during Humphries' detention to identify Humphries in Scottsdale. That identification played a large part in Stine's ordering the stakeout of that residence. Thus, the road from the illegal actions of the BIA to the evidence gained by surveilling was short and straight. *See United States v. Ceccolini,* 435 U.S. 268, 275, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978). In such a case, the deterrence of the exclusionary rule is required, and the public's interest in convicting lawbreakers must be subordinated to fourth amendment interests. We therefore find that Judge Davies did not err in suppressing the photographs and other evidence from the surveillance.

C. *Thompson's Testimony*

James "Bullet" Thompson was located by Agent Stine from information discovered by BIA agents investigating the crashed airplane near San Carlos.[18] There was no taint from the illegal arrest attaching to Stine's location of Thompson. Once located, however, Thompson only implicated Humphries in the marijuana smuggling operation upon being asked specifically about him. And Stine questioned Thompson specifically about Humphries only because of information tainted by the illegal arrest.[14]

In *United States v. Ceccolini,* the Supreme Court held that the taint of unlawful police action could be dissipated by the exercise of free will be a witness. The Court said,

> Evaluating the standards for application of the exclusionary rule to live-witness testimony in light of this balance, we are first impelled to conclude that the degree of free will

exercised by the witness is not irrelevant in determining the extent to which the basic purpose of the exclusionary rule is advanced by its application. This is certainly true when the challenged statements are made by a putative defendant after arrest, *Wong Sun* [v. *United States,* 371 U.S. at 491, 83 S.Ct. 407]; *Brown v. Illinois,* [422 U.S. 590, 603, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975)], and *a fortiori* it is true of testimony given by nondefendants.

[13]BIA agents discovering the downed aircraft located a motel receipt inside the cockpit in Thompson's name. They also received information from a truck driver who took a man from the area of the crash to the local airport. The airport manager told them that the hitchhiker had called a taxi and in checking with the motel to which the taxi took the hitchhiker, they discovered his name: James "Bullet" Thompson. In following up these leads, Stine located Thompson. It therefore appears that Stine's discovery of Thompson was in no way related to the illegal arrest of Humphries.

[14]Stine claims to have had knowledge of Humphries' identity and possible involvement in the smuggling venture through two separate sources. The first of these was through information obtained during the illegal arrest of Humphries.

Humphries' name had also entered the investigation when BIA agents stopped Lon Raymond Jordan near the crash site. Stine knew Jordan to have been arrested for drug-related offenses in the past. He therefore obtained a list of Jordan's known associates, among whom was Humphries.

In response to questioning by defense counsel Stine testified that Jordan had "[r]oughly 30 to 40" known associates all of whom were "checked out." Driver's license pictures of each were compared to photos taken during the surveillance of the house in Scottsdale.

Neither of these sources of information about Humphries was free from the taint of his illegal arrest. The BIA information about Humphries was obtained during that arrest, while the BIA information concerning Jordan indicated that Humphries was a suspect only when the picture of Jordan's associates were compared with pictures taken during the surveillance tainted by the illegal arrest.

435 U.S. at 276, 98 S.Ct. at 1060. Thus, a distinction was made between the "live witness" testimony of a potential co-defendant and that of a witness not arrested and not implicated in the criminal activities at issue. Additionally, the Court stated that an exercise of free will be a witness may dissipate the taint of unlawful police action only where "any statements [made by the witness] are truly the product of detached reflection and a desire to be cooperative." *Id.*

In this case, it is clear that Thompson was implicated in the marijuana smuggling operations: he was the alleged pilot of the marijuana-carrying airplane. Moreover, Thompson answered Stine's questions as part of a "plea agreement." "Under such circumstances it is unreasonable to infer that [Thompson's] response [to Stine's questions] was sufficiently an act of free will to purge the primary taint . . ." *Wong Sun v. United States,* 371 U.S. at 486, 83 S.Ct. at 416. Therefore, the testimony of Thomspon concerning Humphries and his part in the criminal endeavor is tainted and was properly suppressed.[15]

[15]We do not here decide the question of whether an exercise of free will could ever dissipate a taint attaching to information used to question any witness or potential witness. Whether the *Ceccolini* rationale, announced as it was in a case involving the use of tainted information to *discover* a witness, is properly applicable to a situation where the discovery of the witness is untained but the information *used to question* that witness is tainted is unclear. We only decide that, even if *Ceccolini* is applicable to a case such as that at hand, the standards for dissipation are not met under the facts and circumstances before the court.

IV. *Conclusion*

In sum, we affirm so much of Judge Davies' order, as suppresses the photographs taken during, and other evidence obtained through, the surveillance of the Scottsdale residence. We also affirm that portion of the order suppressing Thompson's testimony concerning the identity and participation of Humphries in the marijuana smuggling operation. We reverse as to Sisto's testimony, which is admissible and as to evidence concerning the license number of the car discovered by Stine at the Scottsdale residence. We remand for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, REMANDED FOR FURTHER PROCEEDINGS.

APPENDIX D

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

April 14, 1980

The Honorable Wade H. McCree, Jr.
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Re: United States v. John Richard Humphries
No. 78-1803

Dear Mr. McCree:

The Court today entered the following order in the above-entitled case:

> "The petition for a writ of certiorari is granted The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *United States v. Crews*, 445 U.S. (1980)."

Very truly yours,
MICHAEL RODAK, JR., Clerk

By

Francis J. Lorson
Deputy Clerk

th

cc: David S. Hoffman, Esquire

Office-Supreme Court
F I L E D
APR 21 198

No. 80-1654

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN RICHARD HUMPHRIES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1654

JOHN RICHARD HUMPHRIES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence against him should be suppressed as the fruit of an illegal arrest.

Petitioner and four others were charged in a four-count indictment with conspiracy to import marijuana, in violation of 21 U.S.C. 963, 960(a)(1) and 952(a); conspiracy to distribute marijuana, in violation of 21 U.S.C. 960(a)(1) and (b) and 952(a); and attempted possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 846 and 841(a)(1) and (b) and 18 U.S.C. 2 (Pet. App. 2a, 3a n.1).

Following two pretrial hearings, the United States District Court for the District of Arizona suppressed, as the fruit of an unlawful arrest, all evidence concerning petitioner's identity and participation in the charged offense. The court of appeals affirmed in part and reversed in part, 600 F. 2d 1238 (9th Cir. 1979) (reprinted in part at Pet. App. 22c-29c). In *United States* v. *Humphries*, 445 U.S. 956

(1980), this Court granted the government's petition for a writ of certiorari, vacated the judgment of the court of appeals, and remanded for reconsideration in light of *United States* v. *Crews*, 445 U.S. 463 (1980). On reconsideration, the court of appeals reversed the suppression order (636 F. 2d 1172; Pet. App. 1a-20a).

Petitioner now contends (Pet. 10-17) that the court of appeals misapplied the analysis of *United States* v. *Crews*, *supra*, and erroneously concluded that the order suppressing evidence should be reversed. Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to suppress the evidence. If petitioner is acquitted following a trial on the merits, his claims will be moot. If, on the other hand, petitioner is convicted, he will then be able to present his present contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. We note that the district court's order granting petitioner's suppression motion was entered more than three years ago, on January 26, 1978 (Pet. App. 2a). Final disposition of the case has been delayed since that time. There is no reason to prolong this delay further. See, *e.g.*, *United States* v. *MacDonald*, 435 U.S. 850, 863 (1978); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 29-30 (1943).[1]

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[1] Because this case comes to the Court at an interlocutory stage, we do not discuss the merits of the questions presented in the petition. We will, of course, file a response on the merits if the Court requests.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1981

DOJ-1981-04